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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LEON WILBURN COOK, Defendant and Appellant.	2d Crim. No. B200996 (Super. Ct. No. F394217) (San Luis Obispo County)

Leon Wilburn Cook appeals the judgment following his conviction for second degree robbery (Pen. Code, § 211),[1] and petty theft with prior convictions (§ 666). He contends the trial court erred in instructing the jury regarding robbery and assault as a lesser included offense, and in improperly admitting evidence of his prior convictions and silence during police interrogation. He also claims ineffective assistance of counsel. We will order the dismissal of his theft conviction. Otherwise, we affirm.

FACTS AND PROCEDURAL HISTORY

Cook walked out of a Von's supermarket carrying concealed merchandise he had not paid for. Outside the store, he bumped into a customer entering the store. The customer saw Cook carrying a beer bottle and packages of meat under his jacket, and reported to a store supervisor that it appeared he was stealing the items. The supervisor

[1] All statutory references are to the Penal Code unless otherwise stated.

walked out of the store where the customer identified Cook standing near a soda machine. Store manager Jim Clark joined the supervisor and pursued Cook who had moved away from the soda machine. Clark ran down a walkway between Von's and a Goodwill store and saw Cook behind the Goodwill store. Cook was attempting to stuff two packages of rib eye steaks into his backpack.

Clark ordered Cook to return the steaks he had taken from the store. Cook cursed Clark and pushed him out of his way. Undaunted, Clark repeated his demand for return of the meat. Cook threw the steaks on the ground. Clark then demanded the beer. Cook denied having any beer and pushed Clark a second time. Clark, still undaunted, demanded the beer a second time. Cook took a bottle of beer out of his backpack, moved towards Clark, and dropped the bottle. Cook raised his arms at Clark and said: "You think you are a tough guy? I will kick your f-ing ass." Cook tried to hit Clark but Clark wrestled Cook to the ground and restrained him until the police arrived. Clark suffered minor injuries during the scuffle.

Video tapes from the Vons' security camera showed Cook passing through the area near the checkout stands without stopping to pay for anything. The items Cook took from the store had a value of $56.

At trial, Cook testified that he had been panhandling and a Vons customer offered to buy him $50 worth of food. Cook testified that the customer went into the store, bought packages of steak, and gave them to Cook outside. Cook then walked behind the Goodwill store to drink beer he stated he had bought earlier in the day. Store manager Clark approached and, without identifying himself as a Vons employee, demanded the beer. Cook testified that he placed the steaks on the ground and that Clark initiated a fight with him.

Cook was charged with robbery and petty theft with three theft-related prior convictions resulting in three terms in a penal institution. It was also alleged that Cook had suffered eight prior convictions for the serious and violent felony of committing lewd acts on a child under the age of 14. (§ 288, subd. (a).) The offenses were tried by jury, and Cook admitted the prior theft-related convictions. In a bifurcated trial, the court

found true allegations of the eight lewd act convictions. Cook was sentenced to a prison term of 25 years to life as a third strike offender.

DISCUSSION

No Error in Jury Instructions

1. *Failure to Instruct Regarding Immediate Pursuit*

Cook contends the trial court failed to instruct the jury that, to constitute a robbery, a thief's use of force against a victim seeking to recover recently-stolen property must occur when the victim is in immediate pursuit of the thief. We disagree.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The force or fear may occur either when gaining possession of the property or in attempting to retain the property. (*People v. Gomez* (2008) 43 Cal.4th 249, 257; *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28.) A theft or robbery continues from the original taking until the perpetrator reaches a place of temporary safety, and force used at any time during this period is sufficient to sustain a conviction for robbery. (*Estes*, at p. 28.) As in the instant case, mere theft becomes robbery if the perpetrator resorts to force or fear to prevent a store employee from regaining possession of stolen property. (*Ibid.*)

A trial court is obligated to instruct the jury on the general principles of law relevant to the issues raised by the evidence. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1158.) If the jury would have no difficulty in understanding the statute without guidance, the court need only instruct in statutory language. (*People v. Poggi* (1988) 45 Cal.3d 306, 327.) Clarifying instructions are not required unless a statutory word or phrase has a technical or legal meaning different from its commonly understood meaning. (*People v. Rodriguez* (2002) 28 Cal.4th 543, 546-547.) Here, the trial court properly instructed the jury using the standard form jury instruction for robbery which consists of the language of the robbery statute and established and unchallenged judicial authority.

Cook argues that the use of force against a victim seeking to recover stolen property elevates theft to robbery only when the victim began an "immediate pursuit" of

the perpetrator as soon as the taking occurred. He concedes his argument is novel and seeks to add an additional element to the crime of robbery which has no basis in legal authority.

In effect, Cook seeks to place the burden of avoiding violence on the victim by limiting pursuit of the perpetrator to situations where the victim acts without considering the consequences of an effort to recover stolen property. This argument is unpersuasive on its face and ignores settled law that robbery is a continuous crime that is completed only when the perpetrator reaches a temporary place of safety. Any pursuit and ensuing violence that occurs prior to a robber reaching temporary safety is sufficient to establish a robbery.

Moreover, there is no evidence indicating that store manager Clark's pursuit of Cook was anything other than immediate. Cook was identified as a shoplifter as soon as he left the store and pursuit began immediately thereafter when the store supervisor went outside. The pursuit remained immediate and continuous despite the passage of a few minutes before store manager Clark began his chase. (See *People v. Johnson* (1992) 5 Cal.App.4th 552, 562; *People v. Thongvilay* (1998) 62 Cal.App.4th 71, 80-81.)

2. *Temporary Place of Safety Instruction*

The trial court instructed the jury with CALCRIM No. 3261 which states that a robbery continues until the perpetrator has reached a temporary place of safety.[2] Cook contends that the instruction was incorrect and confusing in this case because it may have led the jury to believe a robbery was already in progress before Cook used force, and that a robbery was committed even if Cook had reached a temporary place of safety before using force. Cook claims the jury should have been instructed that the crime of *theft* continues until the perpetrator reaches a temporary place of safety and becomes robbery only if force is used before that place of safety is reached. We disagree.

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2 As instructed by the court, CALCRIM No. 3261 provides: "The crime of robbery or attempted robbery continues until the perpetrator has actually reached a temporary place of safety. [¶] The perpetrator has reached a temporary place of safety if: [¶] He has successfully escaped from the scene; and [¶] He is no longer being chased; and [¶] He has unchallenged possession of the property."

A potentially confusing instruction constitutes error if there is a reasonable likelihood the jury misconstrued or misapplied the instruction in a way that violated the defendant's constitutional rights. (*People v. Bland* (2002) 28 Cal.4th 313, 332; *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) In making this determination, we consider the jury instructions as a whole, not one particular instruction or a part of one instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) An omission from one instruction may be set forth in another instruction or the instructions taken as a whole. (*Ibid.*) We assume that jurors are capable of understanding and correlating all jury instructions given by the court. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.)

Here, the jury was correctly instructed with the elements of both theft and robbery, including an instruction that robbery requires the use of force or fear, and that force must be used before the perpetrator has reached a temporary place of safety. The jury was made aware of the critical element of force distinguishing robbery from theft, and there is no reasonable likelihood that a juror could have failed to understand from the instructions as a whole that a robbery was committed only if Cook used force before he reached a temporary place of safety.

3. *Failure to Instruct on Assault as Lesser Included Offense*

Cook contends the trial court erred by not instructing the jury on simple assault. He argues that assault is a lesser included offense of robbery under the accusatory pleading test, and that there was substantial evidence he committed the lesser offense of assault but not robbery. We disagree.

First, assault is not a lesser included offense of robbery. An offense is necessarily included within another when the statutory elements of the greater offense include all of the statutory elements of the lesser offense, or the facts alleged in the accusatory pleading include all of the elements of the lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) Robbery is the taking of property in the possession of another against his or her will when the taking is "accomplished by means of force *or* fear." (§ 211, italics added.) An assault is an unlawful "attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.)

Cook concedes that assault is not a lesser included offense of robbery under the statutory elements test because robbery may be committed by fear alone, but asserts that it is a lesser included offense under the accusatory pleading test. Cook argues that, because the accusatory pleading alleged a robbery through the use of force *and* fear, the robbery necessarily included use of force and could not have been committed solely through fear.

Cook's argument was rejected in *People v. Wright* (1996) 52 Cal.App.4th 203, where the court held that an assault is not necessarily included in robbery even when the pleading alleges a robbery by force and fear. (*Id.*, at p. 211; see *People v. Parson* (2008) 44 Cal.4th 332, 350.) *Wright* reasoned that commission of a robbery by force is possible without committing an assault because the use of force may be actual or constructive, and may induce fear by the threat of force without an attempt to apply force or the present ability to commit an assault. (*Wright*, at pp. 210-211.)

Second, even if assault were a lesser included offense of robbery, there was no substantial evidence that Cook committed the offense of assault but not robbery. A trial court is obligated to instruct the jury on a lesser included offense only when substantial evidence raises a question as to whether all the elements of the charged offense were present. (*People v. Romero* (2008) 44 Cal.4th 386, 402; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Evidence that the defendant is guilty only of the lesser offense must be substantial enough to merit consideration which, in this context, is evidence from which a reasonable jury could conclude that the lesser offense, but not the charged offense, was committed. (*Romero,* at p. 403; *Breverman,* at pp. 154, 162.)

Cook argues that there was substantial evidence that he had reached a temporary place of safety before using force, as well as substantial evidence that he bought the beer and essentially returned the steaks by dropping them on the ground. These assertions are not supported by substantial evidence. The only reasonable conclusions supported by the evidence are that Cook had not reached a temporary place of safety because he was in plain sight and being pursued by Vons personnel, and relinquished possession of the property after his use of force failed to affect an escape.

No Doyle Violation

Cook contends the prosecutor improperly sought to impeach his trial testimony by asking him on cross-examination why he did not tell the police his version of the events at the time of his arrest. Cook argues that this questioning constituted a violation of his constitutional right to remain silent after his arrest. (*Doyle v. Ohio* (1976) 426 U.S. 610, 619.) We disagree.

It is established that a prosecutor may not use a defendant's post-*Miranda*[3] silence to impeach his exculpatory testimony at trial. (*Doyle v. Ohio, supra,* 426 U.S. at p. 619.) When a person is informed of, and exercises, his right to remain silent, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Id.,* at p. 618, fn. omitted.) For a constitutional violation to occur, the prosecutor must use a defendant's post-arrest silence for impeachment in cross-examination or argument, and the trial court must allow such use, generally by overruling a defense objection. (*Greer v. Miller* (1987) 483 U.S. 756, 761-765.) Depending on the context, the violation will constitute evidentiary error, prosecutorial misconduct, or both. (*Id.,* at pp. 764-766; *People v. Galloway* (1979) 100 Cal.App.3d 551, 556-562.)

At trial, Cook testified that another Vons customer bought the steaks for him, and that he bought the beer at another store. On cross-examination, the prosecutor asked Cook why he did not tell this to store manager Clark. Cook answered that he told Clark that the merchandise was his, but did not have time to explain further. The prosecutor then asked why Cook did not then relate his version of the events to the police at the scene. Defense counsel objected and the court conducted an unreported sidebar conference. After the sidebar, the prosecutor asked Cook what he told the police officer, and Cook answered, "Nothing. I want a lawyer." When asked why he did not say more to the officer, Cook testified that he was already under arrest, and "[i]t won't do a bit of good. I'm going to jail."

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3 *Miranda v. Arizona* (1966) 384 U.S. 436.

The next day, although defending his cross-examination of Cook, the prosecutor requested the trial court to instruct the jury regarding Cook's silence. The prosecutor proposed an instruction stating that a defendant has the constitutional right not to talk to the police, and the jury should "not consider, for any reason at all, the fact that" the defendant did not talk to the police.[4] Defense counsel joined in the request and the trial court gave the instruction to the jury.

Based on the record as a whole, we conclude that Cook has not established a violation of the *Doyle* rule. Clearly, the prosecutor sought to impeach Cook by eliciting testimony that he refused to describe the incident to the police, but the *Doyle* rule applies only to silence after a defendant has been given *Miranda* warnings. (*Fletcher v. Weir* (1982) 455 U.S. 603, 607; *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1841; *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 240.) In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, it does not violate due process of law to permit cross-examination regarding post-arrest silence when a defendant chooses to testify. (*Weir,* at p. 607.)

Here, there is no evidence that Cook had been given *Miranda* warnings at the time he declined to tell his story to the police and, except for his own testimony there is no evidence regarding when he was arrested or whether or when he asserted his right to remain silent. In fact, Cook does not contend on appeal that he had been given *Miranda* warnings but, instead, incorrectly asserts that the *Doyle* rule applies to defendant's post-arrest silence even if *Miranda* warnings have not yet been given.

In addition, the trial court's admonishment to the jury not to consider Cook's unwillingness to answer police questions corrected any potential for prejudice from the prosecutor's cross-examination. Brief questioning by a prosecutor concerning a defendant's post-*Miranda* silence is not a violation of due process when the trial court

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[4] The instruction given by the court, a modified version of CALCRIM No. 355, provides in its entirety: "A defendant has an absolute constitutional right not to testify or to talk to the police. If you find that the defendant chose not to talk to the police, do not consider for any reason at all the fact that the defendant did not do so. Do not discuss that fact during your deliberations or let it influence your decision in any way."

sustains an objection and admonishes the jury. (*Greer v. Miller*, *supra*, 483 U. S. at pp. 764-765.) In this case, the questioning was more extended and an admonition was not given until the following day, but the admonition was clear and the prosecutor did not argue the point to the jury. There is no basis in the record to conclude that the jury did not follow the instructions of the court. (See *People v. Adcox* (1988) 47 Cal.3d 207, 253; *People v. Cox* (2003) 30 Cal.4th 916, 961.)

In any event, any violation of *Doyle* was harmless beyond a reasonable doubt. (*People v. Hughes* (2002) 27 Cal.4th 287, 332 [harmless error analysis applies to *Doyle* error].) We conclude that, beyond a reasonable doubt, the overwhelming evidence of guilt would not have resulted in a different verdict even had the challenged cross-examination not occurred. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Cook's explanation of the events was at best implausible, and was contradicted by testimony from another Vons customer and by Vons security cameras. Any rational jury would credit the prosecution's case, reject the defense, and find that Cook was guilty as charged.

Recognizing the inadequacy of the record, Cook argues that trial counsel provided ineffective assistance of counsel by failing to determine prior to his testimony when Cook was given *Miranda* warnings by the police. Cook also claims counsel provided ineffective assistance by stipulating to what Cook calls the "paltry" admonition given by the trial court.

To prevail on a claim of ineffective assistance of counsel, defendant must establish representation below an objective standard of reasonableness and resulting prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) We presume counsel's conduct falls within the wide range of reasonable representation, and a record which does not disclose why counsel acted or failed to act in a certain manner does not establish deficient representation unless there could be no satisfactory explanation. (*Strickland v. Washington* (1984) 466 U.S. 668, 689-690; *People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Here, there is no showing of deficient performance by defense counsel. The record does not disclose the content of the sidebar after counsel's objection, or

whether the events following the arrival of the police at the scene would have provided any basis for further action by counsel beneficial to Cook. There was also no deficient performance in counsel's stipulation to an admonition which protected Cook's constitutional rights. Moreover, Cook has made no showing of prejudice.

Cook also argues that the prosecutor committed misconduct in statements to the court at the time he requested the admonition. The prosecutor stated that, during cross-examination, Cook "blurted out that he had been Mirandized and arrested" and, on direct examination, told the police that he had been jumped. Cook asserts that he did not "blurt" out anything during cross-examination, and did not testify that he told the police that he had been jumped until cross-examination.

There was no prosecutorial misconduct. Such misconduct requires the use of deceptive or reprehensible methods to persuade the court or jury, which result in the denial of a fair trial. (*People v. Haskett* (1982) 30 Cal.3d 841, 866; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 390-391.) Here, the prosecutor's comments were outside the presence of the jury, and any distortion or inaccuracy was minor. Moreover, because the comments were made to obtain an admonition favorable to Cook, there could have been no prejudice.

Impeachment with Prior Convictions

Cook contends the trial court abused its discretion in permitting the prosecutor to impeach him with evidence of his eight prior felony convictions for lewd acts on a child under the age of 14. He claims the evidence was unduly prejudicial, and that the trial court failed to weigh such prejudice against probative value as required by Evidence Code section 352. We disagree.

Any felony conviction involving moral turpitude may be admitted at trial to impeach a testifying defendant, subject to the trial court's discretion to exclude evidence whose probative value is substantially outweighed by its prejudicial effect. (*People v. Castro* (1985) 38 Cal.3d 301, 306.) A trial court's ruling will be upheld unless it is arbitrary or capricious and results in a miscarriage of justice. (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.)

In exercising its discretion, the trial court should consider the so-called *Beagle* factors which are the extent to which the prior conviction reflects adversely on honesty or veracity, its nearness in time, whether the prior conviction is for the same or similar conduct as the charged offense, and the likelihood defendant will not testify out of fear of being impeached by the conviction. (*People v. Beagle* (1972) 6 Cal.3d 441, 453; *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) Cook, however, does not argue that the *Beagle* factor compels exclusion of evidence of his prior convictions. He concedes his prior crimes show moral turpitude, does not claim they were too remote in time or so similar to the charged offense to create undue prejudice, or that they prevented Cook from testifying at trial.

Instead, Cook argues that the trial court did not properly exercise its discretion because it did not engage in the weighing process required by Evidence Code section 352. The record shows the contrary. Cook filed a written motion to exclude the evidence and there is discussion on the record indicating the court balanced probative value against prejudice in ruling on the motion. Performance of the balancing process can be inferred from the record as a whole. (*People v. Prince* (2007) 40 Cal.4th 1179, 1237.)

Cook also argues that admission of evidence of all eight of his prior felony convictions was excessive and cumulative, and that evidence of one conviction would have been sufficient. Courts, however, have placed no arbitrary limits on the number of prior convictions admissible for impeachment, and admission of multiple and identical prior convictions is permitted. (*People v. Green, supra,* 34 Cal.App.4th at p. 183; *People v. Lewis* (1987) 191 Cal.App.3d 1288, 1297-1298; *People v. Dillingham* (1986) 186 Cal.App.3d 688, 695.)

Other Contentions

Cook contends the trial court erred by admitting evidence that store manager Clark was still afraid of Cook at the time of trial. Cook argues that the evidence was irrelevant and portrayed Cook as a dangerous man, but concedes that any prejudicial effect is insufficient to warrant reversal. Cook also contends, however, that the

cumulative effect of the trial court's errors and trial counsel's deficient performance was prejudicial. We have considered each of Cook's claims, and neither singly nor cumulatively do they establish prejudice requiring the reversal of the conviction. (See, e.g., *People v. Kipp* (1998) 18 Cal.4th 349, 383.)

Petty Theft Conviction Must be Reversed

Cook contends that his petty theft conviction must be reversed as a lesser included offense of robbery because both offenses arose from the same underlying contact. (See *People v. Ortega* (1998) 19 Cal.4th 686, 689-690, overruled on other grounds in *People v. Reed, supra,* 38 Cal.4th at pp. 1228-1229.) Respondent concedes, and we agree with Cook's position.

The conviction for petty theft with prior convictions (§ 666) is reversed. Otherwise, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Ginger E. Garrett, Judge

Superior Court County of San Luis Obispo

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